



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kumbo Products Company, Ltd.

File: B-255661.2

Date: March 25, 1994

Jason M. Rugo, Esq., Gallop, Johnson & Neuman, and Bok Won Hong, for the protester.
John L. Long, Esq., Wendy A. Polk, Esq., and Riggs L. Wilks, Jr., Esq., Department of the Army, for the agency.
Barbara C. Coles, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's assertion that the awardee will be unable to perform insulation services because, in the protester's view, the awardee lacks sufficient experience, a license to perform these services, and the capability to provide only materials manufactured in the United States, concern the agency's affirmative determination that the awardee is responsible. The General Accounting Office will not review a procuring agency's affirmative determination that an offeror is responsible absent a showing of possible fraud or bad faith on the part of the contracting agency or that definitive responsibility criteria in the solicitation were misapplied.

DECISION

Kumbo Products Company, Ltd. protests the award of a contract to Anam Construction Company under request for proposals (RFP) No. DAJB03-93-R-0115, issued by the Department of the Army for polyurethane foam insulation and estomeric coating services and repair work at various locations in the Republic of Korea.

We dismiss the protest.

The RFP, issued on June 2, 1993, contemplated the award of a fixed-price requirements contract to the low priced, responsible offeror. Section M of the solicitation required the contractor to have: (1) experience applying polyurethane foam and (2) an application license or the ability to obtain one. The RFP also required the contractor to use polyurethane spray foam and elastomeric coating materials manufactured totally in the United States.

Ten firms submitted proposals by the closing date. During the initial evaluation, the contracting officer discovered that some of the offerors failed to indicate the source of their materials and/or equipment. By letter dated June 28, the contracting officer advised offerors, including Anam, that the solicitation specifically required the successful offeror to use U.S. manufactured polyurethane foaming products and to have polyurethane foaming experience.

The contracting officer reviewed the supplemental information from these offerors and concluded that six offerors were in the competitive range. Best and final offers were due on September 24. Since Anam offered the low BAFO price (\$4,350,248) and was found to be responsible, the contracting officer awarded Anam the contract. The contracting officer's determination that Anam was responsible was based in part on his conclusion that Anam met the RFP's experience and license requirements by proposing an experienced subcontractor (Woo Sung Urethane Co., Ltd.) to perform the polyurethane foaming work; the contracting officer also concluded that Anam's proposed materials comply with the RFP's requirement for U.S. manufactured materials.

Kumbo contends that the award to Anam was improper because the contracting agency failed to review the awardee's ability to perform the contract. To support its position, Kumbo argues that the selection of Anam shows that the contracting officer deviated from the RFP requirements because, in its view, Anam and its proposed subcontractors lack foaming experience and a foaming license.¹

Since the RFP did not include evaluation criteria and offerors were not required to submit technical proposals, the agency's assessment of Anam's experience and its ability to obtain a license concern the offeror's ability to perform the contract, and thus, are elements of the offeror's responsibility. See Int'l Serv. Assocs., Inc., B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 (the issue of whether or not a prospective contractor has the ability to obtain a license is a matter of responsibility); see also Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 (absent a specific evaluation factor assessing a

¹The protester initially also argued that the agency's selection decision was improper because Anam submitted a below cost offer and because of alleged ambiguities in the solicitation. The agency rebutted these arguments in its agency report. The protester, in its comments on the agency report, did not address these issues; therefore, we deem them abandoned. See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338.

prospective contractor's experience, the issue of whether the offeror is sufficiently experienced to perform the contract is a matter of responsibility). Consequently, Kumbo's arguments, in our view, are essentially independent challenges to the contracting officer's determination that Anam is a responsible offeror.

A determination that a firm is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a firm's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., R-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.

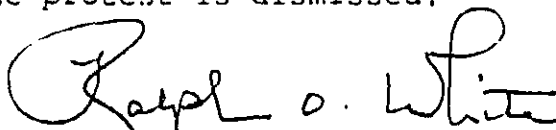
The agency explains that its affirmative determination of the awardee's responsibility was based in part on its assessment of the awardee's subcontractor's experience. Specifically, the contracting officer considered the subcontractor's business license, training certificates, and performance of over 60 foam contracts using the same type of foam application required by the RFP.² Based on this information, the contracting officer concluded that the awardee and its subcontractor were capable of obtaining the required license. Kumbo has not alleged that the contracting officer engaged in fraud or bad faith in reaching these conclusions. Accordingly, we have no basis to review these protest grounds. See King-Fisher Co., supra.

Kumbo also argues that the award to Anam was improper because the firm can not meet the RFP's requirement that offerors must use only U.S. manufactured polyurethane spray foam and elastomeric coating materials during the performance of the contract. If an offeror does not indicate that it is proposing to use something other than U.S. manufactured materials during its performance of the contract, acceptance of that offer will result in an obligation on the part of the offeror to use such materials. Whether the offeror has the capability to use these materials concerns a matter of the offeror's responsibility. See The Pratt & Whitney Co., Inc.; Onsrud Mach. Corp., B-232190; B-232190.2, Dec. 13, 1988, 88-2 CPD ¶ 588.

²Generally, an offeror may rely upon the experience of a technically qualified subcontractor to satisfy a solicitation's experience requirement. Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163, recon. denied, B-2533376.2, Oct. 27, 1993, 93-2 CPD ¶ 261.

The Army explains that during discussions, Anam informed the agency that it would provide the required materials via a distributorship arrangement that one of its subcontractors (Samjung Fine Corporation) has with an U.S. manufacturer (Premium Polymers). In addition to submitting this information, Anam furnished the agency with price quotations from the manufacturer's distributor as well as the manufacturer's descriptive literature. Based on this information, the contracting officer concluded that the awardee was capable of providing U.S. manufactured materials. Since Kumbo has not alleged that the contracting officer engaged in fraud or bad faith in reaching this conclusion, we have no basis to review this protest ground. See King-Fisher Co., supra.

The protest is dismissed.

A handwritten signature in dark ink, appearing to read "Ralph O. White". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ralph O. White
Acting Assistant General Counsel